Cases 14-RC-12824
14-CA-30379
14-CA-30406

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIG RIDGE, INC.,
Respondent

AND

UNITED MINE WORKERS OF AMERICA,
Charging Party

BRIEF OF BIG RIDGE, INC. IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. Statement of the Cases.

This is a consolidated unfair labor practice and election objections case involving Big Ridge, Inc. ("Company") and the United Mine Workers of America ("Union" or "UMW").

The Company operates an underground coal mine and coal preparation plant in Equality, Illinois, called Willow Lake Mine. On May 19 and 20, 2011, a representation election was held pursuant to the Union's representation petition in a unit of production and maintenance employees. Of approximately 438 eligible voters, 219 cast votes for the Union and 206 cast votes against (GCX 1(k)). The Company filed timely objections to conduct affecting the results of the election. The Company's election objections were consolidated for hearing with an unfair labor practice complaint issued against the Company on charges filed by the Union. *Id.* Hearings were held on nine (9) days during August and September, 2011, before Administrative Law Judge ("ALJ") Jeffrey D. Wedekind.

The ALJ issued his decision on December 1, 2011. He found that the Company committed certain violations of Section 8(a)(1) of the Act by statements made by a few lower level supervisors that the ALJ found to be "threats" that the Mine would close if the Union won the election. The ALJ also found that the Company made an implied promise of educational benefits to one employee if the Union lost the election. The ALJ further found that the Company violated Sections 8(a)(3) and (1) of the Act by discharging an employee, Wade Waller. The ALJ found that the Company discharged Waller in order to bolster the Company's election objections and remove a possible union supporter before any rerun election could be held pursuant to the Company's election objections. The ALJ recommended, however, that the Company's election objections be overruled and that the Union be certified as the employees' bargaining representative.

In finding that the Company's election objections were without merit, the ALJ discredited the testimony of every non-supervisory employee the Company called as witnesses to testify to pre-election threats made by the Union or its supporters. If the employee witness called by the Company was opposed to the Union during the campaign, the ALJ factored into his credibility analysis that the employee had a "'pecuniary and personal interest" in testifying for the Company in the objections case. The ALJ also uniformly discredited some of the same employee witnesses in finding that the Company violated the Act in discharging employee Waller. In finding that Waller's discharge was unlawful and that the Company also committed violations of Section 8(a)(1) by certain conduct, the ALJ further discredited, with minor exceptions, every supervisory employee who testified for the Company. By contrast, the ALJ credited the testimony of the overwhelming majority of employees who testified for the General Counsel and the Union in the election objections case.

Together with this brief the Company is filing exceptions to the ALJ's decision, which recommended that the Company's election objections be overruled, and to the ALJ's finding that the Company violated the Act by discharging employee Waller. In order to highlight and emphasize what the Company views as the ALJ's outrageous and poorly reasoned discrediting of rank and file employees who testified to threats made by the Union and its supporters, and the ALJ's plainly illogical finding that the discharge of employee Waller violated the Act, the Company is not taking exceptions to the ALJ's findings that the Company violated Section 8(a)(1) of the Act where such findings rest on the ALJ's discrediting of supervisory witnesses who denied or explained the alleged "threats" of mine closure and the "implied promise" of educational benefits to an employee. It is the Company's view that, while the ALJ's wholesale discrediting of Company supervisors is erroneous and unfair, the Company does not wish to risk

undermining its other credibility exceptions by contesting *every* adverse credibility determination by this ALJ where a supervisor was discredited in a one-on-one dispute with an employee, leading to a Section 8(a)(1) finding. As the ALJ has imputed improper motives and testimonial bias to rank and file employees who testified for the Company simply on the basis that those employees did not wish to be represented by the Union, the supervisory employees who testified for the Company had, in the Company's view, even less chance of having their testimony fairly evaluated by this ALJ when giving testimony that supported their employer's position. The ALJ, it seems, simply assumed a bias in favor of the Company among the supervisory witnesses who testified and that such bias could not be overcome under any circumstances. Accordingly, the Company is confining its exceptions to the ALJ's overruling of the election objections and the ALJ's finding that Waller's discharge violated the Act. It is not taking exceptions to the other ULP findings.

II. Questions Involved

1. Whether the ALJ erred in recommending that the Company's election objections be overruled and the Union certified (Exceptions 2 -35, 63-64).
2. Whether the ALJ erred in finding that the Company discriminatorily discharged employee Wade Waller in violation of Section 8(a)(3) and (1) of the Act (Exceptions 1, 36-62, 64-65).

III. The ULP Case.

A. Background.

Until approximately April 2011, the Company's production and maintenance employees at the Willow Lake Mine were represented by the International Brotherhood of Boilermakers ("Boilermakers' Union" or "Boilermakers"). A collective bargaining agreement between the Boilermakers and the Company expired on April 15, 2011 and the Boilermakers disclaimed

further interest in representing the unit (GCX 2). At that point the UMW petitioned the Board to represent the employees (GCX 1(a)). An election was held on May 19 and 20, 2011.

Prior to the election, employees in the bargaining unit openly wore buttons, hats, stickers, shirts and other paraphernalia demonstrating either their support for the UMW or their opposition to the Union (TR 78-80, 110-111, 114, 238-239, 269, 373, 554-557). Employees also decorated their motor vehicles with stickers and signs declaring their position on the union question and openly discussed the merits of the union issues amongst themselves at work, sometimes in the presence of Company supervisors. Additionally, employees expressed their position on the union issues on personal social media sites such as Facebook (TR 390-91, 1741).

Prior to the election, the UMW obtained signed authorization cards from a large majority of the unit employees (Joint Stipulation #1). In response, the Company campaigned for employees to vote against the UMW. As part of this effort the Company made factual presentations to employees in the form of videos, PowerPoint presentations and speeches by Company officials showing the extremely small number of coal mines in the Illinois basin that had been organized by the UMW and other coal mines that had been UMW-organized but had closed. The Company did not attribute the closing of these mines to the UMW but simply noted the lack of functioning UMW-organized mines in the Illinois basin and discussed the need for viable mines to be economically competitive, whether they are union-represented or union-free. (GCX 22). At the same time, the Company's presentation disclaimed that it was the Company's intention or expectation that the Willow Lake Mine would close.

The Company had advised employees, and employees were well aware prior to the UMW campaign (and while the mine had been organized by the Boilermakers), that Willow Lake was experiencing productivity and profitability issues that threatened its viability and that it was

under threat of possible closure from the Mine Safety and Health Administration ("MSHA") due to a Potential Pattern of [Safety] Violations ("PPOV") (TR 424-28, 431, 1804-05, 1942-43). There is no allegation in this case by the General Counsel that the Company's video or other formal presentations to employees about the closure or absence of UMW-organized mines in the Illinois Basin was in violation of the Act, nor does the General Counsel dispute that issues of the economic viability of the Willow Lake Mine as a going enterprise were legitimate and predated the UMW campaign (TR 1800-05).

B. Facts Regarding the Discharge of Wade Waller.

Employee Wade Waller was a ram car operator at the Willow Lake Mine and a member of the voting unit in the election (TR 553). Waller was discharged by the Company on May 27, 2011, for job misconduct (TR 317; GCX 23). The General Counsel contends that the Company discharged Waller for his union and other protected activities in violation of Section 8(a)(3) of the Act. The ALJ found that the Company discharged Waller "to help bolster the Company's allegations against Waller in the election-objections case and remove from the unit one of the Union's most vocal supporters in advance of the requested rerun election" (ALJD 52 line 26, 53 lines 5-6). Yet it is undisputed that the events leading to Waller's discharge and the discharge itself occurred after the election, not before, and were not part of the Company's election objections. Furthermore, Waller was not in any sense a "key" union activist or supporter; he was one of hundreds of unit employees who openly supported the Union. Waller was discharged for job misconduct, not union activity, and he was the only employee in the 440-person workforce who was discharged or disciplined in any way during the Union campaign. The ALJ's contrary finding that Waller's discharge was unlawful is illogical and ignores undisputed evidence that the ALJ never mentioned or evaluated. The facts regarding this allegation are as follows.

Waller had been employed by the Company since 2004 (TR 553). Although Waller was apparently an ardent supporter of the UMW, according to the testimony he was not an in-plant organizer and held no official position with the Union (TR 579). Waller wore pro-UMW stickers and other paraphernalia at work, but so did many other employees at the mine who favored the UMW (TR 555-557, 599). There is no evidence that Waller was necessarily more in favor of the UMW than many other employees or that the Company perceived him as such. Of the nearly 440 employees in the voting unit, Waller is the only employee that General Counsel contends was discharged for his support of the UMW.

As noted, Waller was a ram car operator. A ram car is a battery-powered coal hauling vehicle that is used to transport coal underground from the mine face to a feeder and conveyer that then lifts the coal to the surface for processing and eventual sale. A number of ram cars operate in different segments or "units" (TR 303-06) of the mine every day, hauling coal to the feeder, dumping that coal and then going back to the mine face to be reloaded. The Willow Lake Mine is a 24/7 operation.

Ram cars are driven through the narrow tunnels of the mine in essentially total darkness (TR 614). Ram cars are massive in size and weight – approximately 30 feet in length and weighing about 8-10 tons when loaded (TR 593-95) – and easily capable of injuring or killing a miner who is struck or run over. *Id.* In 2010, the Willow Lake Mine experienced a fatality underground when a miner was found dead on the mine floor, having been run over and crushed by a ram car. MSHA investigated the fatality and as a result required Willow Lake to position a person called a "feeder watcher" at the location of each coal feeder to monitor ram car traffic to and from that area (TR 1375). The feeder watcher is charged with the responsibility of signaling ram cars to enter or not enter the feeder area, as appropriate, for reasons of safety and to unload

their coal onto the feeder (TR 164, 614). The feeder watcher signals the ram car driver by use of his headlamp, which every employee wears underground, moving his head and lamp side to side to signal "stop" or in a circular motion to signal that it is permissible to proceed toward the feeder. *Id.* The feeder watcher himself is positioned in an area where he can possibly be in danger of being struck if a ram car operator disobeys a signal not to enter or to stop (TR 1350-51). The feeder watcher can also signal the ram car driver by radio command, in appropriate circumstances, in addition to flagging with his headlamp (TR 1376).

On May 20, 2011, just hours after the NLRB election in which the UMW received more votes than the Company, Waller was operating a ram car and became involved in an incident with another employee, Ronald Koerner, who was serving as the feeder watcher on the same unit as Waller. Koerner was directing ram car traffic and signaled Waller, who was operating a ram car, to stop and not enter the feeder area (TR 1342-43). Waller purposely ignored Koerner's signal and proceeded to approach the feeder and dump his coal (TR 615, 1342-43, 1378). The effect of this action was to overload or "gob up" the feeder, causing it to shut off. Koerner then asked Waller why he had ignored his signal. Waller indicated that Koerner did not know how to perform his job, that the feeder would not clog and that:

> "No matter how many times [Koerner] signaled Waller to stop his ram car, Waller was not going to stop."

Waller repeated this blatant refusal to follow Koerner's signals multiple times during that shift. Additionally, at one point Waller declared, "We are UMWA now and can do what we want," apparently referring to the election result that day (TR 1342-49).

Waller's purposeful refusal to stop upon being signaled by Koerner not only violated the Company's rules, but caused Koerner grave concern for his safety (TR 1342-43). Koerner reported his concerns to his shift leader who instructed Koerner, as a safety precaution, to move

completely out of the path of Waller's ram car and to reroute his path underground to travel a circuitous distance back and forth to his work site to enable him to watch for Waller's ram car vehicle and avoid turning his back to Waller (TR 1342-43, 1354-57). Waller's actions were reported to Scott Lawrence, the Shift Manager on duty (TR 1361). These facts are undisputed in the record notwithstanding the ALJ's naked finding, discussed further below, that "I discredit Koerner's testimony that he felt threatened by Waller" (ALJD 52 fn. 53). This finding by the ALJ cannot stand as it contravenes the established sequence of events testified to by all except Waller himself. Before Koerner's next shift, he informed management that he was afraid to go underground. As a result, he was assigned to an "out by" location because of his fear of Waller's behavior and intentions (TR 1360).

During this same period, Lawrence became aware of an incident in which Waller threatened and taunted another co-worker, Issac Craig, while on duty (TR 1435). The incident started with Waller's accusation that Craig was a "scab" and had insulted Waller and his wife by posting remarks on a co-worker's Facebook page that Waller construed as anti-UMW (TR 1513-14). Waller challenged Craig to a fight (TR 1514-15). Lawrence met with Waller about this incident and about Waller's refusal to heed Koerner's signals underground (TR 1435-36). Waller was unapologetic and became hostile when discussing the issue of Craig (TR 1436). In response, Lawrence told Waller that his conduct needed to cease and that "persons in the mine were [even] afraid to work with him" – a reference to Koerner, although not by name (TR 1435-36). Without asking for any details about this accusation (TR 629-31), Waller responded, "That's ridiculous" and said nothing more (TR 1436-37, 1445-46). After this meeting and his warning to Waller, Lawrence separated Koerner's work location from Waller's and sent Waller back to work pending further investigation (TR 1436).

Lawrence reported Waller's actions to Robert Gossman, the Company's Senior Manager of Human Resources (TR 278). Gossman conducted an investigation (TR 328). He learned not only of Waller's endangering of Koerner with his ram car and Waller's threat to ignore any and all of Koerner's signals to stop the car, but also that Waller appeared to have specifically labeled Koerner a "scab" in a remark to Koerner on Koerner's first or second day on the job (TR 1407-10). Gossman also learned that Waller had threatened to injure another person he deemed a "scab," co-worker Darrell Kirk, a few weeks before the ram car incident with Koerner.[1] Gossman decided to recommend that Waller be disciplined for his actions.[2] (TR 331).

In accordance with the Company's usual practice in such cases, the question of whether Waller should be disciplined or discharged for his actions was discussed with other Company officials, some of whom were in midwest regional offices in Evansville, Indiana (TR 317, 1462-64). This included Tom Benner, Vice President of Underground Operations - Midwest for Peabody Energy, the parent company of Big Ridge, Inc (TR 1462-64). Benner's review focused on Waller's defiance, threats and repeated ignoring of Koerner's signals to stop his ram car underground – very serious offenses, especially in light of the ram car fatality that had occurred at Willow Lake a year earlier (TR 1463-64). After appraising the known facts, Benner

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[1] The ALJ discredited the testimony of Koerner and Kirk and other witnesses to Waller's pre-election statements. We discuss those findings below.

[2] Koerner had become so apprehensive of Waller's threats with the ram car that he requested and was granted a permanent move away from Waller's work area (TR 1366). Prior to asking to be moved, Koerner had been warned by a co-worker, William Meadows, to "watch out" for Waller (TR 370). After the incident with Waller, Koerner found his truck defaced with the word "scab" etched into it. Previously, Koerner had received an anonymous telephone call at home warning him to watch out for his family and that they could "take care of things underground and make it look like an accident." Shortly after the incident with Waller and the ram car, Koerner experienced anxiety attacks underground on two separate occasions, one of which required him to be hospitalized for a period of time before returning to work. (TR 1358-63). Although the ALJ discredited Koerner's testimony regarding the anonymous telephone call he received, this finding is clearly erroneous, as we discuss below, as is the ALJ's stupefying finding that Waller's actions with his ram car did not induce fear in Koerner.

authorized Gossman to terminate Waller's employment if Waller could offer no acceptable explanation for his actions (TR 321, 324, 1463-67).

Gossman subsequently interviewed Waller, who claimed, "I don't know anything about" the incidents with Koerner and the ram car, the threat to Kirk or calling Koerner a "scab" on his first or second day of work at the mine (TR 363). Thus, Gossman concluded the interview by informing Waller that his employment was terminated (GCX 23).

C. Argument on Waller Discharge.

As shown by the recitation of facts above, Wade Waller committed a critical infraction of Company policy and rules by repeatedly disregarding Koerner's flags to stop his ram car and threatening Koerner that "No matter how many times you flag me I'm not going to stop." (TR 1090-91, 1093). Numerous witnesses at the hearing, including General Counsel's own witnesses and even Waller himself (TR 628), although he did not admit to the infraction, testified that such conduct by anyone in an underground mine is an offense meriting discipline (TR 163-64, 208, 231, 264-66, 541-42, 710). Moreover, the Company's investigation disclosed that Waller's infraction may have been motivated by Waller's personal animus against Koerner because he was not a supporter of the UMW in the election campaign (TR 388-89). Most importantly, Waller had threatened Koerner with imminent bodily harm or death and possessed the immediate means (*i.e.,* his ram car) to carry out that threat at the time he made it (TR 388). In these circumstances, the Company was more than justified, indeed compelled, to discharge Waller. To have kept Waller in the Company's employ would be to sanction his actions and expose Waller's co-workers to possible grievous harm or death.

Contrary to the ALJ's finding, the Company had no reason to single out Waller for discipline because of his alleged union activity. The Company was no more cognizant of Waller's support for the UMW than it was of the pro-UMW sympathies of scores of other

employees whose position on the union question was openly on display. Waller's discharge is the only challenged disciplinary action among the nearly 440 employees who were eligible to vote in the election. His discharge occurred after the vote, not before, and thus cannot be found to have been designed to quell UMW support in the election. Furthermore, the discharge occurred fresh on the heels of Waller's serious misconduct and at a time dictated by Waller's own actions, not by events undertaken or instigated by others. Contrary to the ALJ, there is no evidence whatsoever that the discharge was a result of Waller's union support or activities.

Indeed, in his trial testimony, Waller never specifically denied that he had engaged in the conduct that spurred his termination – the refusal to stop his ram car upon Koerner's signal and threat to Koerner that "No matter how many times you flag me I'm not going to stop." General Counsel only elicited testimony from Waller that he denied having engaged in this conduct during his interview with Gossman, not that the conduct did not in fact occur. Thus, there is no direct testimony under oath from Waller that he did not make the threat to Koerner that Koerner testified he made. Waller did relate an incident with Koerner much earlier, when Koerner was new on the job back in early April, that he did not stop on Koerner's signal because Koerner was new on the job and did not know what he was doing when he signaled Waller to stop. Waller omitted entirely from his version of this alleged earlier incident any mention of saying that he was not going to stop "no matter how many times you flag me." Thus, even if Waller's testimony that he gave an explanation to Gossman is credited – and the ALJ did credit that testimony (ALJD 45) – Waller left wholly unanswered the accusation that he abrogated to himself the decision whether or not to stop and thereby inexcusably endangered others. Clearly, Waller's duty was to heed the signals of the feeder watcher – in this case, Koerner – and not to second-guess or question that signal or supplant Koerner's judgment with his own. It was

Koerner's job to direct ram car traffic, not Waller's, and it was Koerner alone who was in a position to make the observations necessary to perform that job. Further, it was Koerner whose life (in addition to the lives of others in the area) was potentially endangered by Waller's threat to steer the ram car where and how he wanted. The total circumstances uncovered by the Company's investigation, including Waller's evident animus toward non-UMW supporters like Koerner, essentially left the Company no choice but to terminate Waller's employment.[3]

Indeed, the evidence clearly shows that it was Tom Benner, a Peabody executive based in Evansville, Indiana, not in the Willow Lake Mine, who made the decision that Waller's employment must be terminated for the ram car incident with Waller, and there is no evidence that Mr. Benner entertained any other belief than that Waller was guilty of a dangerous transgression against Koerner that had broad safety implications requiring prompt and stern action. As an executive with broad responsibility beyond Willow Lake, Benner would not otherwise have been familiar with Waller to have reason to believe that Waller stood out among the many pro-union miners at Willow Lake. Even if Benner was actually mistaken about some of the facts in the Waller-Koerner ram car incident, which we dispute, it is clear nevertheless that Benner believed in good faith that his decision to discharge Waller was proper. In such circumstances, no violation of Section 8(a)(3) may be found. E.g. *DTR Industries, Inc.*, 350

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[3] In addition to his failure in his testimony to directly confront the evidence against him at the hearing, Waller's testimony was evasive and internally inconsistent on a number of other issues. At one point in his testimony, he denied referring to co-workers who did not support the UMW as "scabs" (TR 574), but he then admitted at another point that he had, in fact, done so (TR 557, 588-90). Indeed, Waller even boasted of having written an obscene song about "scabs" that he sang at work (and on the witness stand) (TR 557, 559, 591-92). After prodding on the stand, he admitted to calling employee Issac Craig a "scab" (TR 605-06) and admitted he said "Fuck you, scab" to Craig before Craig retorted "Fuck you, Waller" (TR 570). To the accusation, supported by witnesses at the hearing, that he had yelled, "Fuck all you scabs!" without provocation in a crowded staging area in the bathhouse (TR 480), Waller retreated to testifying that he has a friend and co-worker at the mine who he calls "scab Henson" (as an alleged term of endearment) and that the witnesses must have heard a conversation with this friend in the staging area and nothing more (TR 604-05). This "dodge" by Waller was utterly unconvincing, was disputed by other of General Counsel's witnesses (TR 480) and only buttresses the conclusion that Waller gave untruthful testimony and engaged in exactly the conduct that Koerner testified he did.

NLRB 1132, enf'd 297 Fed. Appx. 487 (6th Cir. 2008) (reasonably held good faith belief that employee is guilty of misconduct controls, not whether employee is guilty in fact).

The General Counsel's effort to salvage his allegation that Waller was discriminatorily discharged by claiming that Waller was a victim of "disparate treatment" by the Company is, contrary to the ALJ, wholly ineffectual. There is no evidence on the record that anyone guilty of an infraction comparable to Waller's threat to Koerner – which was the "real issue" why Benner authorized Waller's discharge (TR 1463-64) – was ever treated more leniently than Waller. Harsh words between employees, even challenges or threats of fistfights on or off the Company's premises, are not of the same seriousness as the behavior that Waller exhibited toward Koerner. Moreover, some of the incidents cited by General Counsel occurred many years before the Waller/Koerner incident, predated the 2010 Willow Lake fatality, and happened at a time when the Willow Lake Mine was under completely different management (TR 396). The evidence shows that incidents where one employee struck another on the job (TR 169-70) were dealt with similarly to the Waller/Koerner incident, which was viewed as a threat of imminent harm by use of deadly force (TR 397). Other incidents were not in that category or involved extenuating circumstances such as in the alleged "fight" between managers Mike Francescon and Eddie Ward in 2007 which involved, at most, wrestling or horseplay (TR 534-35); the alleged 2005 incident underground in which employee William Vaughn said he had a gun in his truck (TR 870, 892-93); and the alleged 2003 incident in which employee Keith Lane used his ram car to try to move aside a scoop vehicle that was blocking his way (TR 1293-94). In addition, an alleged 2010 incident involving Keith Lane and employee Jerry Fox was conceded by General Counsel's own witness (TR 199-200, 1040-41, 1282-84, 1287) to have been an insignificant matter. By contrast, the General Counsel's faulting of the Company for discharging Waller

essentially amounts to a claim that Waller's status as a UMW adherent shielded him from discipline until he actually crippled or killed Koerner or someone else in the course of "not stopping...no matter how many times [Koerner flagged him]." This position is not just absurd but shocking.[4]

In finding that the Company's discharge of Waller was motivated by his union activities and not the misconduct with Koerner, the ALJ disregarded critical admissions in the record and simply sidestepped, without comment and by discrediting unimpeachable evidence, facts which simply cannot be ignored. Thus, the ALJ gave the following explanation for ruling that Waller was a victim of discrimination (ALJD 51):

> In sum, the preponderance of the evidence clearly indicates that the Employer never really believed that the incident was anything more than what Waller testified to at the hearing: he and Koerner simply had a disagreement over whether the feeder was too gobbed up to continue dumping his coal. Koerner "flagged" him with his helmet light to stop dumping so that it would not get gobbed up, and Waller decided to override him and continue dumping because he did not believe Koerner, who was new to both the mine and feeder watching, had any idea what he was talking about, and the Company was pushing the crews to get their production numbers up.
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> Thus, the incident had nothing to do with threatening to run over or "kill" anyone, because the car was already stopped at the feeder and dumping. Nor did it have anything to do with "safety"—a word emphasized by Grossman and Benner in their testimony but which does not appear anywhere in Waller's discharge letter—or a fear that Waller's conduct could result in a repeat of a 2010 fatal coal hauler accident at the mine. Rather, this was simply how Grossman and Benner chose to spin the incident because they knew that the other alleged incidents alone were insufficient to justify discharging Waller given the [Company's] history of tolerating similar or worse conduct by others unrelated to union activity.

In a footnote to this rationale, the ALJ simply declared that "to the extent Gossman, Lawrence, Davis, and Koerner [all witnesses to parts of the post-election incident with Koerner]

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[4] In this regard, it is important to remember that Waller, at the hearing, never specifically denied Koerner's testimony about his threat, much less was repentant or attempted to explain it. Waller also never denied saying to Koerner, "We're UMW now, we can do what we want."

gave testimony contrary to the above findings, I discredit their testimony for all the reasons set forth here and previously with respect to other alleged incidents."

This convenient mass discrediting of Company witnesses by the ALJ cannot pass muster even in light of the Board's oft-stated rule that it will not disturb an ALJ's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that such credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). This is precisely such a case. First, the ALJ's discrediting of Koerner's testimony that he felt threatened by Waller is based on no evidence of any conceivable consequence when compared to the mass of evidence supporting an opposite finding. The undisputed testimony shows that Koerner reacted to Waller's threats to not stop his ram car "no matter how many times you flag me"—a statement that is undenied by Waller and wholly ignored in the ALJ's analysis—by scurrying to alter his underground routine so as to be sure he did not find himself in the path of Waller's ram car for the remainder of the shift. The undisputed evidence also shows that Waller requested a transfer away from Waller's work area so as to be sure he was no longer in danger. Moreover, further undisputed evidence shows that Waller suffered what amounted to a brief nervous breakdown and requested leave from work immediately on the heels of Koerner's actions. In these circumstances it literally defies belief that the ALJ discredits Koerner's testimony about feeling threatened by Waller. That Koerner's testimony was truthful follows from the natural progression of events as verified by all witnesses (except Waller, the accused) and was corroborated by Mine Manager Lawrence and shift lead Davis's testimony regarding Koerner's statements and actions at the time of the occurrence.

Moreover, contrary to his action in crediting wholesale Waller's testimony, the ALJ completely ignored and did not resolve Waller's denial that he was even involved in an incident

with Koerner at all on May 20 but only had a brief disagreement with Koerner about ignoring Koerner's signal to stop his ram car back in early April when Koerner first started the feeder job and, according to Waller, was too inexperienced to know how and when to signal and control ram car traffic in the mine tunnel. Thus, Waller, in contravention of the testimony of numerous witnesses to the May 20 incident with Koerner, simply "stonewalled" that there was no such incident on that day, including that he said he wouldn't stop no matter how many times Koerner flagged him and that "we're UMW now, we can do what we want." As Waller's testimony thus failed to meet the evidence against him and, contrary to the ALJ, it is impossible to deny that Waller intimidated Koerner in the May 20 incident as all the evidence shows, the ALJ's resolution of the Waller discharge on the ground that the Company essentially made up the events to justify ridding itself of one (but only one) of the Union's hundreds of avid supporters is ridiculous on its face and must be rejected.[5]

The ALJ seeks to support his finding that Waller's discharge violated the Act by positing that the Company's reasons for discharging Waller shifted during the trial and, the ALJ would reason, shows that Company representatives "spun" or "twisted" the evidence to make out a case against Waller where none existed. We respectfully submit, however, that this scenario is wholly an artificial construct by the ALJ to justify his conclusion and simply does not "add up";

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[5] The one and apparently only reason to explain the ALJ's discrediting of the testimony of Koerner is that Koerner's post-election written statement to the Company concerning the May 20 incident with Waller did not focus on Waller's precise words and conduct as the ALJ felt it should have if true. However, the ALJ ignores that at this time much was going on with Koerner beyond the incident with Waller—Koerner had had his truck defaced with the word "scab" etched into it and had previously received an anonymous telephone call at home threatening him with harm because he didn't support the Union and was therefore deemed a "scab" by many who did. Also, Koerner was new to the mine and, having entered in the middle of a fierce union campaign, thought it best to lay low and not "rock the boat" about the threats he received (p. 1422-23). These are entirely natural reactions on Koerner's part. Fear may manifest itself in many ways. The ALJ's judgment that, because Koerner did not react by calling the police, he must not have been scared is near-sighted and simplistic.

in short, the ALJ's finding of a violation is a theory in search of facts, not facts in support of a viable theory.

The ALJ begins his analysis of Waller's discharge by quoting witness statements the Company gathered after the election to support its election objections, some but not all of which concerned pre-election incidents involving Waller. The ALJ then represents that these statements form the basis for the Company's original decision to discharge Waller but then states that the Company "no longer even contends that most of the alleged incidents described in the eight statements were the basis for Waller's discharge." In fact, contrary to the ALJ, the Company never contended that these incidents were all the basis of the discharge. Rather, that assertion by the ALJ is a red-herring designed to create the impression that the Company could not decide on the reasons for the discharge and simply amassed an entire group of insufficient reasons to justify ridding itself of Waller. This finding by the ALJ is a dishonest effort to draw attention from the one and only reason that the Company verbalized for discharging Waller—the threat to Koerner with the ram car—as openly and candidly testified to by Tom Benner, who made the discharge decision. The ALJ's effort to portray the Company's discharge decision as a cacophony of failed or pretextual reasons is untrue, highly prejudicial and ignores the overwhelming and undisputed evidence of record.

The Company did not violate Section 8(a)(3) of the Act in discharging Wade Waller and it must be so found.

IV. Election Objections Case: The NLRB Should Order A Rerun Election Because The Union's Conduct Destroyed The Laboratory Conditions Before The Vote.

The pre-election atmosphere at the Willow Lake was anything but the "laboratory conditions" that the NLRA requires. From the top Union leadership down to miners who wore UMW stickers on their helmets, the Union engaged in a campaign of fear, intimidation and

hostility against those who showed support for being Union-free. The Union even resorted to distributing false and misleading documents in an effort to dupe employees into believing that the UMW was already their bargaining representative.

It was under Union President Greg Fort's direction that the Union orchestrated a campaign to intimidate and mislead employees. From the moment the UMW demanded recognition in early April 2011, Fort appointed himself the President of the newly formed UMW local and started demanding that the Company treat the UMW as the bargaining representative of the Willow Lake employees. He wanted no part of a secret ballot election. So, when the Company began educating employees about their right to a secret ballot election, Fort – along with his Union officers and followers – began retaliating against those who signed authorization cards but changed their mind and wanted to explore what it would be like to be union-free. Threats of burning down the homes of non-union supporters, beating them up after work or underground and making it look like an accident, getting employees fired who had work related injuries and, worst of all, threatening to run over a miner underground with heavy equipment were all tactics used and condoned by the UMW before, during and after the election. Voters and those not eligible to vote alike were targets of the Union's hooligan tactics.

Even after the Company presented witness after witness of the Union's terrorist tactics during nine days of hearing, not once did Greg Fort or any Union official take the witness stand to denounce the conduct of their Union supporters. Moreover, the UMW's counsel was asked twice during the hearing to stipulate that the UMW does not condone such violent tactics (TR 897, 1200). The UMW's counsel refused to agree to the stipulation. *Id.*

The purpose of maintaining the laboratory conditions is to make sure employees can exercise their freedom to vote as they choose. The UMW pulled every trick in the book to make

sure that did not happen. The fact that the Union's margin of victory was only 7 votes out of 438 demands a rerun election in light of the severity and magnitude of the Union's objectionable conduct.

A. Facts Supporting Employer's Objection No. 1.

The record is replete with testimony of threats and intimidation against Willow Lake employees who did not support the Union. The atmosphere of fear and intimidation by the pro-Union employees and agents of the Union started weeks before the election and continued after the ballots were counted.

1. Wade Waller Threats.

Waller began terrorizing fellow miner Ron Koerner during Koerner's second day on the job (around April 12, 2011). Waller warned Koerner against supporting the Company. Waller told Koerner, "We will take care of these scabs." (TR 1342). Chris Pezzoni was with Koerner that day and his recollection was similar to Koerner's. Pezzoni, a shift leader, recalls Waller passing by him and Koerner while they were at the dinner hole and Waller said to them, "You vote UMWA, [or] scabs like you won't work here." (TR 1654). Pezzoni understood Waller's threat (TR 1655). Waller referred to anyone who didn't support the Union as a "scab." (TR 1654-1655).

Pezzoni and Koerner were not the only targets of Waller's wrath. Approximately a week before the election, Waller decided to work the midnight shift, which was unusual for him (Tr. 1736). Darrell Kirk, a miner who openly opposed the Union, was Waller's next target. As Kirk was getting dressed in the bathhouse before his shift, Waller said to another employee (but directed at Kirk), "I'll show you how to handle mother fuckers like this . . . you pick something up and you hit them in the fucking head with it, that's how you handle scabs." (TR 1737). Kirk took Waller's threat very seriously. *Id.* Following his threat, Waller mockingly asked Kirk,

"Hey, you need any more stickers?" (referring to "vote no" stickers). Waller then told Kirk, "Go head and vote no and be a fucking scab." *Id.* One of the Union officers, Keith Clayton, the Secretary/Treasurer, was only about 20 feet away in the bathhouse at the time (TR 1738; Employer Exhibit 18). Clayton did not disavow Waller's threat at the time it was made nor was he called by the UMW as a witness to deny or disavow Waller's threat.

The ALJ resolved the issues regarding the pre-election threats by Union agents or supporters to employees who opposed the Union by the convenient expedient of discrediting the testimony of the employee witnesses who testified to the threats. Thus, in the case of Waller's threat to Koerner in early April that "you vote for the Union or scabs like you won't work here," the ALJ discredited the testimony of both Koerner and employee Chris Pezzoni, who was with Koerner when the threat was made. Although the versions of the threat testified to by Koerner and Pezzoni differed to a minor extent, the ALJ chose to completely disregard the testimony of both witnesses because they didn't report the threats to management until after the election, and Koerner and Pezzoni were opponents of the Union and current employees who, quoting the ALJ, had "pecuniary and/or personal interests in testifying for the Company against Waller" (ALJD 5 lines 12-23). At the same time, while acknowledging that Waller "had a strong motivation to deny the incident" (ALJD 6 line 5), the ALJ proceeded to credit Waller because he "impressed me as a credible witness overall", "testified in an earnest and even manner, demonstrated good memory and recall, and was not overly defensive or evasive." "Moreover," said the ALJ, Waller "readily admitted to a number of things that could be used against him, including...that he used the word 'scab' a lot and wrote and sang an unflattering song about scabs." With this reasoning and nothing more, the ALJ blithely concluded that this first alleged threat by Waller simply did not occur (ALJD 6 lines 7-14).

A determination of credibility by an ALJ which does not involve demeanor is entitled to no particular deference by the Board. E.g. *Darling, Inc.*, 267 NLRB 476, 478 (1983). Here, the ALJ's crediting of Waller and discrediting of Koerner and Pezzoni seems particularly strained. Notwithstanding the ALJ's recitation that Koerner and Pezzoni had "interests in testifying for the Company," Waller and other pro-union witnesses had interests in testifying for the UMW, and the more fundamental question is why either Koerner or Pezzoni would fabricate a statement by Waller which, as the ALJ himself admits, is perfectly in character for Waller to have uttered, since Waller often called non-Union supporters "scabs." The fact that the employees did not run to management at that time and report Waller's remarks is wholly consistent with the mindset of the miners, on display throughout these proceedings, to keep most problems to themselves rather than "rat" on co-workers to management and to appear "tough" and not seek help or "rock the boat." Moreover, contrary to the ALJ, Waller did not always "readily admit" to using the "scab" word (TR 604-605) and of course he denied using it with Koerner and Pezzoni. Further, in giving other testimony in this case, Waller was indeed both defensive and evasive, particularly in describing his version of the critical series of events between him and Koerner at the coal feeder on May 20.

There is also no rhyme or reason to the ALJ's discrediting of employee Kirk that Waller threatened him that with "scabs" like him you "pick something up and you hit them in the fucking head with it." The ALJ never explains why he finds that Kirk would fabricate such an incident. Kirk may have been confused about the exact date of the incident but this was no reason for the ALJ to completely discredit Kirk's testimony. Nor, for the reasons explained above, is it of overriding significance that Kirk did not immediately report the incident to management. Again, the words used by Waller are perfectly in character with language Waller

admitted to using on many occasions. Waller knew that Kirk was not in favor of the Union so there was reason for Waller to direct such "scab" comments to Kirk, just as with Koerner and Pezzoni. Kirk had no reason to simply invent a story of this unique verbal exchange with Waller. The ALJ should not be permitted to brush aside highly probative and logical testimony by a witness on the mere rationale that, as here, the witness was uncertain as to the exact date of the incident during what was a long pre-election union campaign, did not immediately run to management with reports of the incident and was anti-UMW. The ALJ erred and should be reversed in his finding that the Company failed to prove that either of Waller's pre-election threats—to Koerner and to Kirk—"actually occurred."

2. <u>Anonymous Phone Calls.</u>

Chris Pezzoni was vocal about his personal decision not to support the Union. As a result, he became a lightning rod for threats. For example, Pezzoni let his "Facebook friends" know that he did not support the Union (TR 1657). After making an anti-Union Facebook posting in late April 2011, Pezzoni received an anonymous phone call at home from a Union supporter who said, "There is more than one way to skin a cat." (TR 1657). Pezzoni then received a second anonymous phone call in which the caller acknowledged seeing one of his Facebook postings. The anonymous pro-Union caller issued a strong warning to Pezzoni: "Scabs like [you] would be taken care of or dealt with at home or at work." (TR 1658). Pezzoni testified that he took that threat very seriously because of the dangerous environment that the miners work in underground; miners have to trust one another in order to avoid accidents (TR 1658). Pezzoni said that the first phone call was about three weeks before the election. The second threatening phone call was about two weeks before the election (TR 1658).

Pro-Union supporters also threatened pro-Company supporters with job loss if they didn't support the Union. Terry Glover testified that he sustained an on the job injury in May, just

before the election (TR 1853). A few days after his injury and before the election, an anonymous pro-Union caller said, "If we don't go Union, you'll lose your job over your injury." (TR 1855). Glover told a number of people at work about the anonymous threat. *Id.*

Ron Koerner also received an anonymous phone call at home from a pro-Union supporter, threatening him. A few weeks before the election, the pro-Union caller said, "[You] better vote for the Union, [it] could be bad for [your] family" and "Things could happen underground to look like an accident" (TR 1361, 1367; Employer Exhibit 12). Koerner also had the word "Scab" scratched in the door of his pickup truck the night of the election (TR 1361; 1428-29).

Again, as with his treatment of other threats made by pro-Union supporters against employees who did not favor the Union, the ALJ discredited practically all of the testimony of anonymous threats made to the employees who were anti-UMW. The ALJ discredited Koerner's testimony of the anonymous call he received for much the same reason that he discredited Koerner's testimony regarding his confrontations with Waller—because Koerner did not immediately report the threats to the Company. This explanation is faulty for the same reasons that the ALJ erred in assessing the truth of Koerner's experiences with Waller—that in the heat of the campaign the anti-UMW miners wanted to appear tough and not "rock the boat." In the case of the calls to employee Pezzoni, the ALJ added nothing to his earlier description of why he discredited Pezzoni except his conclusory statement that "at a minimum, Pezzoni has embellished or exaggerated what was said in the calls." He specifically discredited Pezzoni's testimony that the first caller said "there is more than one way to skin a cat" even though Pezzoni testified that he remembered the call quite well due to that precise language—"more than one way to skin a cat"—and Pezzoni commented that it was an unusual choice of words in Pezzoni's

youthful experience. Other than the possibility that the ALJ simply personally disliked Pezzoni for some reason, unexplained on the record or in the ALJ's decision, there is no reason or support for the ALJ's declaration that Pezzoni was embellishing his testimony. Furthermore, the ALJ's statement that, aside from Pezzoni's testimony, "there is no other evidence of the call" (ALJD 10, Lines 43-44) is hardly a justification for discrediting that the call occurred as the call was, after all, a one-on-one telephone conversation with an anonymous caller.

The ALJ also discredited the testimony of employee Glover regarding the anonymous call he received predicting that he would lose his job if he did not support the Union. The ALJ's explanation for this action is wanting, however.[6] Again, the assumption that an employee like Glover would give false testimony about the call he described defies reason, and the ALJ gives no basis for discrediting Glover except the amorphous comment that "he did not impress me as a particularly reliable witness overall" because Glover did not testify, in response to questions from the ALJ, to having heard rumors that the Mine might close. Glover, like many of the miners who testified, appeared hearing-impaired. Moreover, he was not called to the stand to testify about statements about mine closure and could well have misunderstood the ALJ's question to him on that subject, which came wholly out of "thin air." This is no basis to disregard all of Glover's reasonable testimony – on a completely different subject - as the ALJ did. By doing so, however, the ALJ again managed to maneuver himself into yet another finding that the Company "has failed to establish that the alleged call actually occurred" so as to avoid having to assess the effect of this and other anonymous calls on the outcome of the election. This so-called "credibility" resolution by the ALJ is arbitrary and hollow and should be disregarded by the Board.

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[6] The ALJ did strangely comment that "unfortunately" there were "substantial reasons to doubt" what Glover said. We assume the reference to "unfortunate" was a gratuitous slap at Respondent's argument since nothing else explains such editorializing.

3. Threats By Union Officers and Representatives.

Darrell Kirk was also the target of one the most serious threats before the election by Korby Kirkman (TR 1743-44). Kirkman held the position of Miner's Representative. Miner's Representatives are Union officials who travel with MSHA inspectors (TR 1922). Darrell Kirk testified that, before the election, Kirkman said to him, "Look at that fucking hat (referring to Kirk's "Vote No" stickers); I outta burn your fucking house down" (TR 1743).

Shortly before the election, while driving into the mine, Pezzoni was stopped by a mob of Union supporters, including Dan Bradley. Bradley is the Recording Secretary for the UMW (TR 1961; Employer's Exhibit 18). In a subtle but pointed threat, Bradley told Pezzoni that it "didn't look good for [Pezzoni]" because he was not going to the Union meetings (TR 1659).

Ron Pinkston, a long-time safety representative for the Union and a member of the Boilermakers' bargaining committee and other union positions, also joined in the Union's campaign of threats (TR 859, 883, 895-96, 898-99). Mike Morrow, a former miner at the Willow Lake Mine for six years, testified that he witnessed a conversation between Ron Pinkston and Kyle Hanson, also a miner at Willow Lake. On a day before the election, Pinkston approached Hanson before going underground and asked if he had changed his mind about voting for the Union. Hanson said he wasn't sure, and Pinkston replied that, based on Hanson's past workers' compensation history and the amount of work that he had missed, he would get "fired right off the bat" if the Union did not get voted in (TR 1867). Miners Russell Cullison and Brian Head were nearby to hear Pinkston's threat (TR 1868). In addition to the Safety Committee position with the Union, Pinkston also posted flyers on behalf of the Union during the campaign. *Id.*

Union Officials also used non-verbal intimidation to harass and bully employees even while the election was taking place. Duane "Murray" Shoulders, a miner who has worked at

Willow Lake for about four years, testified that, on May 19, the first day the election polls were open, Ron Pinkston, Union VP Rodney Shires and a third person he did not know gathered around him in the bathhouse near his dressing area. The three folded their arms and stared menacingly at Shoulders the entire time he changed clothes (TR 1883-1885). Moreover, they sat waiting for him while he showered and continued staring at him while he got dressed. The three had no reason to be near Shoulders during the election because they neither worked on Shoulders' shift nor dressed in the area near Shoulders (TR 1886). Shoulders knew that Pinkston and Shires were upset with him because he made his anti-Union sentiments known to the Union President, Greg Fort, before the election. Shoulders testified that he had no doubt in his mind that the three were there to intimidate him because he had told Greg Fort that he was not going to support the Union (TR 1887).

During the second day of the election, May 20, 2011, the same three Union supporters surrounded Shoulders again, this time getting closer and leaning up against a bar where Shoulders gets dressed. Like the day before, they stood and stared at him, trying to intimidate him, the entire time that he got showered and dressed (TR 1890). That day, Pinkston, Shires and the third employee were wearing their military type camouflage UMW shirts, so there was no doubt the message they were sending Shoulders (TR 1891).

The Union's threats were so widespread that a number of Union-free employees agreed they had to work together to assure their safety against the pro-Union supporters. For example, Issac Craig and Darrell Kirk made an agreement that they would "watch each other's back" to make sure nothing happened to either of them, particularly by the pro-Union supporters (TR 1741-1742).

With respect to each of the foregoing incidents involving Union officers or representatives threatening and intimidating employees who did not support the UMWA prior to the election, the ALJ again either found on credibility grounds that the incident did not occur or otherwise determined that the incident was not sufficiently serious to have affected the election outcome. Thus, in the case of Miner's Representative Kirkman's threat to employee Kirk that "I ought to burn your house down" for being against the Union, the ALJ simply concluded that Kirk's testimony was not credible and that, as to Kirkman's denial of the incident, Kirkman's "overall testimony and demeanor betrayed no substantial reason to discredit him" (ALJD 8 lines 17-18). Kirkman's credibility with respect to this particular incident was not further explored or commented upon by the ALJ. On the other hand, the ALJ again discredited Kirk's testimony, as he had in the case of the threat by Waller discussed above, simply because Kirk did not report the incident to the Company until after the election, and Kirk, as a current Company employee who opposed the UMWA, had "both a pecuniary and personal interest in bolstering the Company's objections and overturning the election" (ALJD 8 lines 7-9). There was no discussion by the ALJ of the inherent unlikelihood that Kirk would make up a story as unique as Kirkman's reference to "burning down" Kirk's house; no discussion or appreciation whatsoever that, in the normal course of events, employees are highly unlikely to invent such testimony. Rather, the ALJ simply rested his opinion chiefly if not solely on the fact that Kirk was anti-UMW and therefore must have been lying. This is highly inappropriate and infects not only this particular finding by the ALJ but all of his other findings in which he provides no explanation for concluding that events "did not occur" except that the Company's witness was a current employee and did not want UMWA representation.

In the case of former union steward Pinkston's threat to employee Hansen, the ALJ again discredited the Company's witness, former employee Mike Morrow, and determined that the threat did not occur. Although the ALJ recites that "there are substantial reasons to doubt Morrow's testimony" (ALJD 8 line 44), in fact the "substantial reasons" essentially boil down to Morrow having been opposed to the UMWA at the time of the occurrence and now being employed by a non-union mine that is also part of the Peabody organization. The ALJ gives no other substantive reason why he believed that Morrow appeared at the hearing in this case and gave false testimony. Indeed, although Pinkston himself denied the threat as did Hansen, the ALJ pointedly does not credit Pinkston's denial; rather, he credits Hansen who, as a witness for the Union and a current Mine employee, presumably had more reason to support the Union's victory than Morrow—a former employee—had in seeing the election overturned. Further, the ALJ posits that, because there may have been other, non-supervisory witnesses to the conversation between Pinkston and Hansen but those witnesses were not called to testify by the Company, an adverse inference against the Company could be proper, although the ALJ stopped short of drawing such an inference. The Company respectfully submits that the mere fact that the ALJ even suggested that an adverse inference could be drawn against the Company for not calling rank and file witnesses who by definition are not in the Company's control is absurd and strongly calls into question the ALJ's impartiality in this case. In any event, the ALJ's discrediting of Morrow rests on no sustainable reasons whatsoever and should be reversed and the threat by Pinkston—who the ALJ did not credit—found to have occurred as Morrow testified.

That the ALJ displays a disturbing penchant for disbelieving employee witnesses who were opposed to UMW representation is again starkly on display in his discrediting of employee

Shoulders in the incident involving Union officer Shires and representative Pinkston. The ALJ found "I discredit Shoulders' testimony about the incidents in its entirety," in part because the incidents in question were not reported by Shoulders until four (4) days after the events. This is the flimsiest of reasons to discredit Shoulders, again raising the specter that the ALJ was operating from some measure of bias against the Company and in favor of the UMW in this case. Shoulders' testimony was detailed and explicit as to what he experienced in the bathhouse area prior to voting. To suggest that Shoulders made up this testimony is, to anyone who attended this trial other than the ALJ, simply outlandish. Shoulders testified vividly as to what he felt and witnessed of the conduct of the Union representatives. There was nothing about his testimony that was less than genuine. He had no reason to concoct such a story. His testimony should have been credited and the conduct he experienced factored in to the ALJ's analysis of the merits of the Company's election objections. But like nearly every other incident that was the subject of testimony in the objections phase of the case, the ALJ simply found that the incident did not occur and therefore need not be evaluated as to its effect on the election outcome. This determination should be reversed by the Board.

B. Argument Supporting Employer's Objection No. 1.

1. UMW's Agents Threatened And Harassed Employees, Which Tended To Reasonably Interfere With Employees' Free And Uncoerced Choice In The Election, Requiring That Employer's Objection No. 1 Be Sustained.

In evaluating whether party conduct is objectionable, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *See, e.g., Cedars Sinai Medical Center,* 342 NLRB 596 (2004) (*citing Cambridge Tool & Mfg. Co.,* 316 NLRB 716, 716 (1995)). In deciding whether such interference occurred, the Board will consider (1) the number of incidents of misconduct;

(2) the severity of the incidents and whether they were likely to cause fear; (3) the number of employees subjected to the conduct; (4) the proximity to the election date of the misconduct; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct to bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. (*Id.* at 597) (*citing Taylor Wharton Division,* 336 NLRB 157, 158 (2001); *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 (1985), *enfd.* 794 F.2d 527 (9th Cir. 1986)).

2. <u>The Anonymous Phone Calls.</u>

In *Cedars Sinai Medical Center,* the Board examined whether intimidating and threatening anonymous phone calls to two anti-union employees, knowledge of which was disseminated to about 35 other employees, constituted objectionable conduct. *Id.* at 596- 597. The proposed unit consisted of over 1300 nurses, and the final vote tally was 695 votes for the petitioner and 627 against, with 10 challenged ballots. *Id.* The Board therefore determined that "a relatively narrow 'swing' of only 34 votes could have changed the results of the election." *Id.* at 598. The Board further recognized that only one of the employees received threatening phone calls during the critical period, although the Board considered the threats made outside of the critical period to the extent they added "meaning and dimension" to those made within the critical period. 7 *Id.* at 596.[7] Finally, the Board noted that all threatening calls ceased two weeks prior to the election. *Id.* at 597.

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[7] In *Dresser Industries, Inc.,* 242 NLRB 74 (1979), the Board held that "the *Ideal Electric* rule [regarding the consideration of prepetition conduct as a basis to set aside an election] does not preclude consideration of conduct occurring before the petition is filed where ... such conduct adds meaning and dimension to related post-petition conduct." In deciding to consider prepetition conduct and set aside the election, the Board rejected Respondent's contention that only one isolated act occurred during the critical period, noting that the act was "but an extension of Respondent's consistent pattern of antiunion conduct." *Id.*

The Board, reversing the ALJ, found that the threatening anonymous phone calls constituted objectionable conduct. The Board held that the threats, having been tied to the employee's opposition to the union, were reasonably calculated to interfere with the employee's freedom of choice. *Id.* at 598 (*citing G.H. Hess, Inc.,* 82 NLRB 463, 465 (1949)). The Board also found that the threats were disseminated to a "determinative number of unit employees," as a narrow "swing" of 34 votes could have changed the result of the election. *Id.* Moreover, the Board found that the effects of the threats were not diminished by the fact that they ended two weeks before the vote, as "the serious nature of the threats was such that they would tend to linger in the minds of employees who had heard about them for weeks after the threats themselves had ended." *Id.* The Board held that "it is reasonable to assume that the threats were still fresh in the minds of these employees at the time of the election." *Id.*

Here, the three employees received anonymous threatening phone calls within weeks and days of the election. There can be no dispute as to the seriousness of the calls— "scabs" would be dealt with at work and at home. And one caller made it clear that they could make it look like an accident.

With a "swing" of only 7 votes, or a 1.6% margin of the 438 voters, the anonymous calls, along with the in-person threats, clearly destroyed the laboratory conditions of the election.

3. Threats of Job Loss.

In *Lyon's Restaurant,* 234 NLRB 178 (1978), the Board considered whether threats of job loss by union agents were objectionable conduct. The proposed unit consisted of 36 eligible voters, with balloting resulting in 16 votes for the petitioner and 11 cast against, with 6

In *Cedars Sinai Medical Center,* the threatening phone calls made during the critical period threatened the pets of one employee; those made before the critical period threatened physical harm to another employee and her family. The Board held that "[t]he threats to Barnes are even more disturbing when viewed in the context of threats to Faxon..." 342 NLRB at 598.

challenges. *Id.* On one occasion prior to the filing of the petition, a union shop steward informed two employees that, if they did not join the union, they would lose their jobs. *Id.* at 178. During the critical period, the union also submitted a written notice to employees stating that they were "subject to removal" from their jobs if they did not pay their dues. *Id.* at 179. The Board held that the threats were objectionable, noting that they "carried a sufficient ring of plausibility to have interfered with the election." *Id.*

At the Willow Lake Mine, two employees who suffered work related injuries, Terry Glover and Kyle Hanson, were told they would lose their jobs if the Union was not voted in. Although Glover's threat was from an anonymous caller, Hanson's threat was by a UMW official, Ron Pinkston.

4. Threats Of Physical Harm And Intimidation Directed At Union-Free Supporters.

In the present case, agents and supporters of the UMW made threatening and harassing statements to employees who did not support the Union. Waller threatened Issac Craig, Ron Koerner and Darrell Kirk. Kirkman threatened Darrell Kirk with burning his house down. Similarly, Rodney Shires and Ron Pinkston intimidated Shoulders in the bathhouse because he did not support the Union. There is no question that Rodney Shires and Ron Pinkston are actual agents of the Union. Rodney Shires is the Vice President of UMWA Local 5929 (TR 1273; Employer's Exhibit 18). Ron Pinkston was on the Boilermakers' bargaining committee and was on the Boilermakers' safety committee since 2005; he worked for the UMW making calls to employees during the campaign; he represented employees on behalf of the Union who exercised their Weingarten Rights; and he currently serves as a Miner's Representative which is a position appointed by UMWA Local 5929 (TR 859, 883, 895-896, 898-899).

It is clear that the fears of employees arising from the Union's threats and harassment extended throughout the critical period and even days after the election. The threats against Koerner started on his second day of employment in mid-April 2011 and other employees were threatened throughout the critical period. Some of the threats and harassment were widely disseminated and occurred in public, particularly when Wade Waller threatened Issac Craig in the staging area before the shift started.

Out of 438 votes, only 7 votes would have swung the results of the election. With such a close election, it cannot be said that the fear and intimidation created by the Union did not impact the results of the election. As in *Cedars Sinai Medical Center* and *Lyon's Restaurant,* the record in this case demonstrates that (1) the threats and harassment were of a serious and specific nature directed specifically at the question of union support, *see also Service Employees Local 87 (GMG Janitorial, Inc.),* 322 NLRB 402 (finding threats of job loss to be objectionable conduct); (2) the threats were widely disseminated in relation to the size of the unit (with the record demonstrating the likelihood that dozens of employees either witnessed or heard about them); (3) most threats were made during the critical period and those that were not added "meaning and dimension" to those that were; (4) the threats were potentially determinative; and (5) the fear created by the threats lingered on throughout the critical period. The record establishes that certain employees, while acting as agents of the UMW, engaged in objectionable conduct. For these reasons, the Board should order a rerun election.

5. Supporters Of The UMW, Regardless Of Whether They Are Deemed Agents, Created An Atmosphere Of Fear And Reprisal Rendering A Free Election Impossible.

In evaluating whether third party conduct, such as Wade Waller's conduct, is objectionable, the Board considers whether conduct during the election was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. *Cal-West*

Periodicals, Inc., 330NLRB 599 (2000) (*citing Westwood Horizons Hotel,* 270 NLRB 802). The Board will consider the following in evaluating third party conduct: (1) the seriousness of the threat; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated; (4) whether the person making the threat was capable of carrying it out; and (5) whether the threat was "rejuvenated" at or near the time of the election. *Westwood Horizons Hotel,* 270 NLRB at 804.

In *Westwood,* the Board considered whether threats by two non-agents, pro-union employees to "beat up" employees who did not vote for the union constituted objectionable conduct. The Board rejected the hearing officer's conclusion that the threats were not serious because they were directly made to only three employees, noting that "whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner depends on the threat's character and circumstances and not merely on the number of employees threatened." *Id.* at 803. The Board found that the threats were disseminated "to some extent" within the unit, because two or three other employees were present when the threats were made. *Id.* The Board also found that the threats were rejuvenated around election day, as the two pro-union employees physically escorted two of the previously threatened employees to the voting area in view of others waiting to vote. *Id.* Finding that "an election cannot stand whenever conduct disruptive or destructive of the exercise of free choice by the voters occurs," the Board sustained the employer's objections and set aside the election. *Id.*

In *Smithers Tire and Automotive Testing of Texas, Inc.,* 308 NLRB 72 (1992), the Board considered whether isolated threatening remarks were objectionable in a unit of 123 eligible voters, in which the tally of ballots was 57 votes for Petitioner and 54 votes against. In that case, one employee, who was found to be an agent of the union, made the remark "this is what

happens when you cross us" when referring to the black eye of another employee. *Id.* at 72. Later, two other non-agent employees threatened to flatten the tires of another employee if she voted against the union, and told her that others would know how she voted. *Id.*

The Board found it "immaterial" that the threat regarding the tires did not go beyond its intended recipient. *Id.* at 73. The Board found that "[t]hreats to damage an automobile have a particular significance here where the record shows that the Employer's workplace is isolated and the employees need their cars to go to work." *Id.*

Reversing the hearing officer and setting aside the election, the Board concluded that "at least two votes" could have been influenced by the threats, and "where, as here, the votes of the two threatened employees could be determinative of the election, there is a substantial question whether the tally in favor of the Petitioner reflected the free choice of a majority of the employees." *Id.*

In *Electra Food Machinery, Inc.,* 279 NLRB 279 (1986), the Board set aside an election in which two non-agent union supporters threatened an employee with harm if he did not sign a union card and vote for the union, after which time written threats of physical harm and property damage to known or suspected anti-union employees appeared in writing on the company bathroom walls. *Id.* at 279. The Board accepted the hearing officer's determination that the written threats were widely disseminated, but took issue with her conclusion that it did not appear that employees acted in fear of any threats being carried out. *Id.* at 280. Noting that the test of fear and reprisal is an objective one, the Board held that the written threats of harm, continuing over the critical period, supported the Employer's objections. *Id.*

In the present case, Waller's threats were not only severe, but also were made in the presence of dozens of employees. At no time did the Union leadership denounce Waller's

conduct, let alone try to stop him. Therefore, considering the Board's criteria for setting aside an election on the basis of third party conduct, the Company presented an overwhelming case here.

C. Facts Supporting Employer's Objection No. 2.

It is undisputed that the Union distributed a series of documents trying to link Peabody Energy with Patriot Coal. (Employer's Exhibit 21). Although Union officials testified that the purpose of the documents was to show that Patriot Coal and Peabody shared the same address (TR 190-92; Greg Fort testimony), the true reason was an attempt to show that Peabody (the parent of the Company) is currently signatory to the United Mine Workers 2007 Wage Agreement.

The handwritten notes on the Union handout made clear the Union's intent:

- *What do you think?*
- *Did they lie?*
- *Peabody already pays into this (UWMA Pension) fund.*
- *Peabody is still affiliated with Patriot Coal.*
- Under the listing for Michael Altrudo, the handwritten note says, "*Works for Peabody.*"

Even a flyer that the Union distributed both at the mine and at meetings at the Union hall falsely links Peabody and Patriot. The flyer begins with: *"Peabody Coal already has signed a national agreement."* (Employer's Exhibit 21). During the campaign, the Union never told employees that the purpose of the Peabody/Patriot material was to show that the two companies shared the same address, as Fort and others asserted for the first time during the hearing. And, even assuming that explanation to be true for the sake of argument, it still supports the argument that the Union was representing to employees during the campaign that Peabody and Patriot were the same company in an effort to make them believe that the Company was already a signatory to the UMW national agreement - a blatant falsehood.

D. Argument in Support of Employer's Objection No. 2.

The Board has long held that it will set aside elections because of forged documents. *Midland National Life Insurance Company*, 263 NLRB 127, 133 (1982). The Board specifically stated it does this because the "deceptive manner" of the document "renders employees unable to evaluate" what the document is. *Id.* Such conduct requires Board intervention because employees cannot decipher between propaganda and fake documents. *Id.* at 131.

The Board has recently applied this rule to facts in *Albertson's, Inc.*, 344 NLRB 1357 (2005). There, the union distributed a fake letter discussing alleged employer plans to open other stores. *Id.* at 1358. The letter addressed a central theme of the union's campaign and employee concern. After clear evidence acknowledging the fake letter, the employer asked the union to make known to employees that the letter was not real. *Id.* at 1361. The union declined. The Board explained:

> In sum, employees were being told by the Employer that the letter was a fake, but the Union was distributing the letter to the employees as real. Faced with conflicting views from the two party antagonists, the employees were "unable to recognize propaganda for what it [wa]s." *Midland National*, 263 NLRB at 133. The Union could have cleared up the confusion, but chose not to do so. *Id.* at 1361. Ultimately, the Board sustained the objection and set aside the election. *Id.*

Here, the Union has done exactly as the union did in *Albertson's*. The Union distributed a fake document falsely depicting a relationship between the parent of the Company (Peabody Energy) and Patriot Coal, suggesting that the Company was already a signatory to the BCOA collective bargaining agreement. This allegation was an important theme and concern of employees and the Company attempted to rebut the UMW's false statements—just like the employer did in *Albertson's*. But the UMW was trying to dupe voters into believing that all they had to do to get the BCOA agreement was to vote for the Union—the collective bargaining agreement had already been negotiated on their behalf.

Just as the letter in *Albertsons* "was a fake" that the union "distribut[ed] . . . as real," so too were the Peabody/Patriot documents. Indeed, just as the Board found that such conduct, when related to an important theme of the election, constituted objectionable conduct that required setting aside the election, the Willow Lake employees were unable to separate propaganda from a forgery on a vital issue to exercising their free choice. When employee free choice is compromised, a new election must be held.

E. Facts Supporting Employer's Objection No. 3.

Objection No. 3, similar to the Company's second objection, focuses on the misrepresentations made by Greg Fort and other Union officials suggesting that the employees were already represented by the UMW, thereby implying there was no need for employees to vote in a secret ballot election. The Employer introduced, without objection, a letter signed by Greg Fort to the Willow Lake Human Resources Coordinator which said:

> Dear Melissa:
>
> As of April 15, 2011, Local S-8 is no longer part of the International Brotherhood of Boilermakers. The operating name for Local S-8 will be Coalminers Local Lodge S-8, AFL-CIO. Everything with Local S-8 stays and operates the way it has in the past except that will be handled thru our local office in local officers. Our dues, fees and assessment structure will stay the same it has always been. Effective April 15, 2011 all dues, fees and assessments and all reports to do with the following should be sent directly to Local Lodge S-8, Secretary, Treasure (sic) Keith Clayton, at 540 North Commercial St., Suite 101, Harrisburg, Illinois. 62946. We appreciate your cooperation in this matter.

(Employer's Exhibit 18).

F. Argument In Support of Employer's Objection No 3.

As stated previously, the Board will set aside an election when fake documents are distributed that make it so that "employees were 'unable to recognize propaganda for what it [wa]s.'" *Id.* Here, the facts are somewhat similar to *Albertson's*. Just as the union in *Albertson's* distributed a letter to the employees that had false information, the UMW President,

Fort, sent a letter that was blatantly false about the Company's duty to withhold dues. The central problem, as discussed in both *Midland* and *Albertson's*, is that when employees receive documents with false information, they are often unable to discern a forgery from campaign propaganda. *Albertson's, Inc.*, 344 NLRB at 1361. When employees cannot discern between the two, employees cannot exercise free choice because they do not know what they are choosing. Here, the letter was not a forgery like in *Albertson's*. However, it significantly misrepresented the legal status of the Union. The letter suggested that there was an existing collective bargaining agreement between the UMW and the Company and that it was appropriate for the Company to send employees' dues money to the Union. In other words, Fort was suggesting that a secret ballot election was not necessary – everything would be the same as under the Boilermakers' contract, except the UMW replaced the Boilermakers. When employee free choice is compromised, as happened here, a new election must be held.

V. CONCLUSION.

The unfair labor practice allegation against the Company that it discharged Wade Waller for Union activity should be dismissed, and the Company's election objections sustained.

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Dated: December 29, 2011

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served via Electronic Mail to the persons listed on the Service List below on this 29th day of December 2011.

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